

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
EX REL., JOSHUA HARMAN,

Petitioner,

—v—

TRINITY INDUSTRIES INC. &
TRINITY HIGHWAY PRODUCTS LLC.,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit**

SUPPLEMENTAL BRIEF OF PETITIONER

NICHOLAS A. GRAVANTE, JR.
KAREN DYER
BOIES SCHILLER FLEXNER LLP
575 LEXINGTON AVENUE, 7TH FLOOR
NEW YORK, NY 10022

SAMUEL BAXTER
MCKOOL SMITH, P.C.
104 EAST HOUSTON STREET, SUITE 300
MARSHALL, TX 75670

WYATT DURRETTE
DURRETTE, ARKEMA, GERSON & GILL PC
BANK OF AMERICA CENTER, 16TH FLOOR
1111 EAST MAIN STREET
RICHMOND, VA 23219

GEORGE F. CARPINELLO
COUNSEL OF RECORD
TERESA MONROE
JEFFREY S. SHELLY
BOIES SCHILLER FLEXNER LLP
30 SOUTH PEARL STREET,
11TH FLOOR
ALBANY, NY 12207
(518) 434-0600
GCARPINELLO@BSFLLP.COM

T. JOHN WARD
WARD & SMITH LAW FIRM
P.O. BOX 1231
LONGVIEW, TX 75606

JANUARY 3, 2019

COUNSEL FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner files this Supplemental Brief, pursuant to Rule 15.8, in order to call attention to issues raised in the supplemental brief of the Solicitor General expressing the views of the United States in *Gilead Sciences, Inc. v. Campie ex rel. United States*, No. 17-936 (*Gilead*) (“SG Br.”) The issues raised by the Solicitor General argue in favor of granting *Harman’s* petition for the reasons outlined below:

(1) The Solicitor General’s brief denies there is a circuit split at the motion to dismiss stage regarding the proper application of the *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989 (2016) (*Escobar*) materiality standard, but there remains a circuit split at the summary judgment and post-trial stage concerning the burden and the evidence required for materiality.

In *Harman*, the Fifth Circuit found as a matter of law post-trial that the FHWA’s letter of continuing eligibility for payment for the ET-Plus was determinative of materiality. In contrast, the Ninth Circuit in *United States ex rel. Rose v. Stephens Inst.*, 909 F.3d 1012, 1021 (9th Cir. 2018) found summary judgment was properly denied despite evidence of continuing payment and evidence that the government had continued to pay in other, similar cases.

(2) The Solicitor General’s brief acknowledges that a government decision to continue to do business with a False Claims Act defendant is not determinative of whether a violation of the Act has occurred since there may be a number of “possible motivations” for the government’s action. (SG Br. at 12-13). Nor should the

agency's decision to keep doing business with a defendant be determinative since the very reason for the *qui tam* statute is Congress's distrust of the ability or willingness of federal officials to declare that they were defrauded by those with whom they contracted or did business, and often have close personal and/or political relationships.

(3) In *Harman*, there was none of the evidence that the Solicitor General considers important for determining the weight that should be given to a federal agency's decision to ignore the fraudulent conduct. The FHWA's position was a complete black box since both defendants and the FHWA fought all efforts to obtain evidence from the FHWA and the agency declined to provide witnesses or testimony and withheld all documents pertaining to its decision to allow the ET-Plus to remain eligible for payment despite Relator's allegations.

Therefore, the motivation behind the FHWA's decision is still unknown except that Harman presented evidence at trial of Trinity's extensive lobbying efforts and its millions of dollars in campaign contributions to key Senators and Congressmen in oversight roles to the Department of Transportation at the very time the FHWA's decision was made.

(4) The extent of the government's knowledge is crucial to establish materiality, as the "mere awareness of allegations concerning noncompliance with regulations is different from knowledge of actual noncompliance." SG Br., at 19. Though the Solicitor General (SG Br., at 17) distinguished *Harman* on this point because *Harman* went to trial, in fact, the FHWA letter upon which the Fifth Circuit relied to reverse

the jury verdict came prior to the first trial and before the FHWA had any evidence of Defendants' multiple undisclosed and failed crash tests or the extent of Defendants' efforts to cover up their fraud.

And significantly, after trial the FHWA instituted debarment proceedings against Defendants, a fact that showed that "it did not simply refuse payment in one instance" but took steps that could lead to terminating its relationship with Defendants entirely. *United States v. Luce*, 873 F.3d 999, 1007 (7th Cir. 2017) (debarment proceedings instituted after the government obtains knowledge of the fraud are evidence of materiality). The FHWA also accelerated implementation of a new testing procedure for end terminals because of concerns that Trinity's terminals were failing in exactly the manner that Relator's expert testified they were failing.

(5) Finally, as noted by the Solicitor General (SG Br., at 6) *Gilead*, like *Escobar*, dealt with implied certifications where the mere submission of a claim is "an alleged false certification" by defendants of compliance with "thousands of complex statutory and regulatory provisions" not all of which are necessarily material to the government's payment decision. *Escobar*, 136 S. Ct. at 2002.

In contrast, there was no dispute in *Harman* that express certifications of compliance with a critical FHWA safety regulation were necessary to obtain payment. Trinity conceded at trial that its express certifications were essential to sell their end terminals and that its certifications were false. Under such circumstances, *Escobar's* framework for materiality is not applicable. *See United States v. Palin*, 874 F.3d

418, 423 (4th Cir. 2017) (questioning whether *Escobar* applies outside of implied certification cases); *United States ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, No. 1:07-CV-00960, 2017 WL 1758074, at *3 (E.D. Va. May 3, 2017) (Denying reconsideration based upon *Escobar* of a materiality decision in an express certification case because “*Escobar* revolved around the implied false certification theory.” (emphasis added)); *United States ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772, 811 (E.D.N.Y. 2017) (“there is no reason to believe that *Escobar* modified or eliminated existing law . . . pertaining to [the express certification] theory of falsity”), *rev’d on other grounds*, 899 F.3d 163 (2d Cir. 2018). Here, the Fifth Circuit purported to apply *Escobar* despite the fact Trinity made false express representations. This Court should clarify the extent, if any, that *Escobar* applies in express certification cases. *See* Petitioner Cert. at 29-34.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NICHOLAS A. GRAVANTE, JR.
KAREN DYER
BOIES SCHILLER
FLEXNER LLP
575 LEXINGTON AVENUE,
7TH FLOOR
NEW YORK, NY 10022

SAMUEL BAXTER
MCKOOL SMITH, P.C.
104 EAST HOUSTON STREET,
SUITE 300
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